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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	GEN Docket No. <u>90-314</u>
)	ET Docket No. 92-100
Amendment of the Commission's)	RM-7617, RM-7760, RM-7782,
Rules to Establish New Narrowband)	RM-7860, RM-7977, RM-7978,
Personal Communications Services)	RM-7979, RM-7980

To: The Commission

**REPLY TO OPPOSITION TO
PETITION FOR RECONSIDERATION**

ORIGINAL

Puerto Rico Telephone Company ("PRTC"), by its attorneys, and pursuant to Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), respectfully submits this Reply to the Opposition to Petition for Reconsideration ("Opposition") filed by Pegasus Communications, Inc. ("Pegasus") on November 2, 1994 in the above-captioned proceeding.¹

I. INTRODUCTION

In the First Report and Order² in the above-captioned proceeding, the

¹ The Opposition opposes the Petition for Reconsideration filed by PRTC on October 7, 1994 ("Petition"), seeking reconsideration of the Commission's modification of the narrowband Personal Communications Services ("PCS") service area definitions in the Second MO&O in the above-captioned proceeding. See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, Second Memorandum Opinion and Order, FCC 94-218, 9 FCC Rcd 4519 (released August 25, 1994) ("Second MO&O").

² Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, First Report and Order, FCC 93-329, 8 FCC Rcd 7162, 73 RR 2d 435 (1993) ("First Report and Order").

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Commission adopted nationwide, regional (based on Major Trading Areas, or "MTAs") and local service areas for licensing narrowband PCS. As originally adopted, the local service area definition included one Basic Trading Area ("BTA") for Puerto Rico.³ Nearly three months after the filing deadline for petitions for reconsideration of the First Report and Order, Pegasus filed a Petition for Reconsideration ("Pegasus Petition"). Pegasus asked the Commission to reconsider the broadband PCS service areas and establish two BTAs for Puerto Rico, and further to establish two BTAs for narrowband PCS in Puerto Rico sua sponte.

Subsequently, in disposing of petitions for reconsideration of the First Report and Order, the Commission added five larger regional service areas for the licensing of narrowband PCS, but did not disturb the BTA and BTA-like local service area definitions (including the one BTA-like service area for Puerto Rico).⁴ However, after an April 4, 1994 ex parte presentation by Pegasus ("Ex Parte"), the Commission modified the Rules to provide for two BTA-like service areas for Puerto Rico, first for broadband PCS⁵ and then for narrowband PCS.⁶

PRTC petitioned for reconsideration of this action on several grounds. First, PRTC asserted that the Commission's action amending the narrowband PCS service area

³ See First Report and Order at ¶ 27 (to be codified at 47 C.F.R. § 99.12(c), see Appendix A attached to First Report and Order).

⁴ See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, Memorandum Opinion and Order, FCC 94-30, 9 FCC Rcd 1309, 74 RR 2d 822 at ¶¶ 13-14 (1994) ("MO&O") (to be codified at 47 C.F.R. § 99.102(d), see Appendix A attached to MO&O).

⁵ See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Memorandum Opinion and Order, FCC 94-144, 75 RR 2d 491 at ¶ 79 (released June 13, 1994) ("Broadband MO&O").

⁶ See Second MO&O at ¶¶ 17-18.

definitions violated certain fundamental procedural requirements applicable to rulemaking proceedings. Second, restoration of the one BTA service area definition, originally adopted on a neutral and impartial basis, is necessary to protect the public's interest in the fairness and impartiality of the Commission's processes. Finally, PRTC demonstrated that one BTA-like service area for Puerto Rico best reflects local patterns of trade and the natural flow of commerce, and would best serve the public interest by encouraging efficient and cost-effective narrowband PCS services.

In opposition, Pegasus contends that the Commission had the necessary authority or discretion to amend the Puerto Rico service area definition on its own motion, see Opposition at 2-5, citing precedents from comparative hearing cases to support the proposition that petitions for reconsideration toll the period in which the Commission may reconsider a rule on its own motion. Id. at 4 and n.6. In addition, Pegasus argues that the two BTA service area definition for Puerto Rico is appropriate for narrowband PCS. Id. at 6-8.

II. ARGUMENT

The service area definition for narrowband PCS originally adopted by the Commission in the First Report and Order, which provided for one BTA or "local service area" for Puerto Rico, became effective thirty days after publication in the Federal Register, see First Report and Order at ¶ 154, or on September 10, 1993.⁷ PRTC asserts the Commission was obligated to follow the notice and comment rulemaking procedures required by the Commission's

⁷ Public notice of the First Report and Order was published in the Federal Register on August 11, 1993, see 58 Fed. Reg. 42681 (1993); therefore, the rules adopted therein became effective thirty days after such date, or on September 10, 1993.

Rules⁸ unless there was (i) a timely petition for reconsideration of that specific rule; (ii) a timely reconsideration of such rule by the Commission on its own motion; or (iii) the amendment of the rule was of the type which may be made without notice. Absent such action, or even pending the outcome of such action, the one BTA service area definition was a final rule, with which parties must comply. See 47 C.F.R. § 1.429(k).

In its Petition, PRTC addressed and eliminated each of these possible sources of authority, under which the Commission may adopt or amend a rule without adhering to the required rulemaking procedures, before concluding that the Commission was obligated to comply with such rulemaking procedures.⁹ As an initial matter, PRTC demonstrated that no party timely filed a petition for reconsideration of the service area definition for Puerto Rico, for narrowband PCS; therefore, the Commission did not act pursuant to Section 1.429(i), 47 C.F.R. § 1.429(i). See Petition at 5-6.

Next, PRTC addressed three possible theories under which the Commission has authority to act sua sponte.¹⁰ Id. at 6-7. First, PRTC demonstrated that the Commission could not have acted under Section 1.108, the general rule for reconsideration by the Commission on

⁸ Specifically, the Rules regarding the commencement of rulemaking proceedings and the requirement of a notice of proposed rulemaking, see 47 C.F.R. §§ 1.411-1.413 and 1.421; allowing for the filing of comments by interested persons, see 47 C.F.R. § 1.415; and regarding Commission action in the proceeding, see 47 C.F.R. § 1.425.

⁹ But see Opposition at 2 (where Pegasus mistakenly summarizes PRTC's arguments by combining them to "the Commission is without authority to so amend the regulations ... because no petition for reconsideration on the BTA-like structure of Puerto Rico had been filed within the 30 day period").

¹⁰ Pegasus believes that the Commission acted sua sponte, see Opposition at n.3, although neither Pegasus nor the Commission has cited the authority under which the Commission properly could have acted sua sponte.

its own motion,¹¹ since such action was not taken within the time allowed by Section 1.108. Id. at 6. Pegasus agrees with PRTC that the Commission could not have modified the rule by acting sua sponte pursuant to Section 1.108 -- albeit on the grounds that the rule change was a "reconciliation" or "modification," and Section 1.108 allows the Commission only to "set aside" an action taken. See Opposition at 3. Therefore, both parties agree that Section 1.108 could not have provided the authority for the Commission's action, and that the action was a modification of a substantive rule. However, PRTC submits that any modification or amendment of a substantive rule, which is in effect, may only be taken after a notice and comment rulemaking, which was lacking in this case.

In addition, PRTC demonstrated that the Commission could not have acted pursuant to Section 1.412(b), since the amendment or modification was not a rule change of the type enumerated therein, or Section 1.412(c), since the Commission did not state in its decision that it was acting without prior notice for "good cause shown." Id. at 7-8. Pegasus argues that the rulemaking procedures required by Section 1.412 were not required, on the basis that (i) the initial notice of proposed rulemaking was sufficient to satisfy the Administrative Procedure Act ("APA"); and (ii) petitions for reconsideration serve to toll the 30 day period for Commission reconsideration on its own motion, in rulemaking proceedings. See Opposition at 3-4.

¹¹ Pegasus erroneously claims that Section 1.108 concerns "adjudications and not rulemakings." Opposition at 2. However, Section 1.108 is in Subpart A of Part 1 of the Commission's Rules, which contains the "General Rules of Practice and Procedure," which would apply in the absence of a more specific rule. The Rules applicable to adjudications, or hearings, are in Subpart B, 47 C.F.R. §§ 1.201 - 1.364. Since the Rules applicable to rulemaking proceedings, in Subpart C, 47 C.F.R. §§ 1.399 - 1.430, do not have a more specific rule applicable to reconsideration by the Commission on its own motion, Section 1.108 would apply.

Although the initial notice may have been sufficient for the Commission to adopt more than one BTA for Puerto Rico in the First Report and Order, once a different rule had been adopted and became final, as had the one BTA service area definition for Puerto Rico, PRTC submits that any subsequent proposed amendment of the rule must comply with the procedural requirements for rulemaking proceedings. See supra at n.8. By Pegasus' logic, the Commission could amend any of its existing Rules, on its own motion and without prior notice and comment, as long as the amended rule fell within the scope of the original notice of proposed rulemaking, for as long as the proceeding remained open. Such a broad interpretation would allow the Commission, by simply keeping rulemaking proceedings open, to modify any rule at will without further rulemaking; such broad discretion could not possibly be consistent with the APA.

In support of this proposition, Pegasus claims that "it is undisputed that a timely-filed petition for reconsideration serves to toll the 30-day period for reconsideration." Opposition at 4. However, the precedents cited by Pegasus are limited to comparative hearing proceedings,¹² which are fundamentally different from rulemaking proceedings. Comparative hearing proceedings are adversarial proceedings with essentially one issue: determining which one party should win, with the remaining parties losing.

PRTC submits that while it may be logical to toll the thirty day period for reconsideration by the Commission on its own motion in comparative hearing proceedings, it

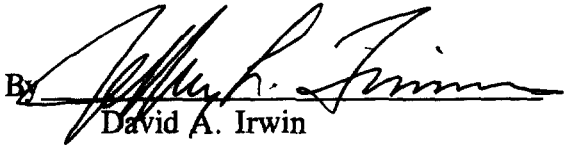
¹² See Opposition at n.6 Pegasus cites Radio Americana, Inc., 21 RR 70a (1961), which involved a comparative hearing for a new broadcast station, and Central Florida Enterprises Inc. v. FCC, 598 F.2d 37, 44 RR 2d 345 (D.C. Cir. 1978), which involved a comparative renewal hearing.

would not be logical to do so in a rulemaking proceeding. In rulemaking proceedings (and the narrowband PCS proceeding is a good illustration of this effect), the Commission may adopt many separate and distinct rules; PRTC asserts that it would be illogical to extend the period for reconsideration of a given rule simply due to the reconsideration of other rules adopted in the same proceeding, especially where the given rule is not implicated by the issues under reconsideration. Furthermore, were the Commission to accept this line of reasoning, it would encourage parties to file requests for the Commission to act on its own motion, after the period for filing petitions for reconsideration had passed, to change rules without notice in any pending rulemaking proceeding -- a troubling precedent for the Commission to establish.

III. CONCLUSION

WHEREFORE, for the reasons set forth herein, PRTC respectfully requests that the Commission reconsider its decision to create two BTA-like service areas in Puerto Rico for the licensing of narrowband PCS and reinstate the previously adopted definition of one BTA-like license for Puerto Rico.

Respectfully submitted,
PUERTO RICO TELEPHONE COMPANY

By 
David A. Irwin
Jeffrey L. Timmons
Its Attorneys

Irwin & Campbell, P.C.
1320 18th Street, N.W.
Suite 400
Washington, D.C. 20036

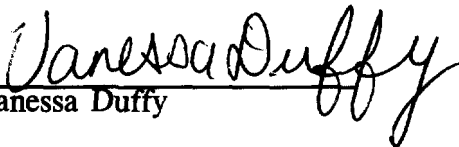
(202) 728-0400

November 14, 1994

CERTIFICATE OF SERVICE

I, Vanessa Duffy, hereby certify that on this 14th day of November, 1994, copies of the foregoing "REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION" have been served by hand delivery or first class United States mail, postage prepaid, upon the following:

James E. Meyers, Esq.
Susan R. Athari, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015


Vanessa Duffy

* indicates hand delivery